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PANETRA PARKING SERVICES SDN BHD & ORS v. TTDI HARTA SDN BHD & ANOTHER APPLICATION

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL SUIT NO: BA-22NCC-36-03-2020]
B 7 JANUARY 2021

LEGAL PROFESSION: *Solicitors – Disqualification – Application for – Solicitor acted for applicant in earlier proceedings – Solicitor represented applicant's adversary in later proceedings – Whether there would be conflict of interest and prejudice – Whether solicitor would be embarrassed – Whether solicitor's professional conduct would be impugned – Whether solicitor ought to be disqualified from acting for applicant's adversary – Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5 & 35*

D TTDI Harta Sdn Bhd ('defendant') had a car park operating contract ('contract') with Platinum Parking Sdn Bhd ('Platinum Parking') as the car park operator at the defendant's property. Panetra Parking Services Sdn Bhd ('Panetra Parking') held 30% shares in Platinum Parking while Alunan Rancak Sdn Bhd ('Alunan Rancak') held the remaining 70% shares. Panetra Parking, and its directors, and Alunan Rancak ('plaintiffs') had filed, *inter* E *alia*, a leave application at the High Court to initiate a derivative action on behalf of Platinum Parking, against the defendant ('2017 OS'). The High Court dismissed the action but, upon appeal, the Court of Appeal granted the leave application ('2018 appeal'). Messrs Azlan Shah Sukhdev & Co ('ASSC') represented the plaintiffs in the 2017 OS and the 2018 appeal. The F plaintiffs then commenced the present action against the defendant on the grounds that, *inter alia*, (i) the defendant failed to account for Platinum Parking's share of the income collected from the car parks; and (ii) the premature termination by the defendant of the contract was allegedly wrongful ('2020 suit'). In a twist of events, ASSC switched camps and G represented the defendant in the 2020 suit. Pursuant to rr. 3, 4, 5 and 35 of the Legal Profession (Practice and Etiquette) Rules 1978 ('Rules'), the plaintiffs sought to disqualify ASSC from acting for the defendant ('encl. 9') while the defendant sought to disqualify the plaintiffs' solicitors, Tetuan Mohaji Hazury & Ismail ('MHI'), from acting for the plaintiffs ('encl. 12'). H In support of encl. 9, the plaintiffs submitted that (i) ASSC had represented them in the 2017 OS and the 2018 appeal; (ii) there would be a conflict of interest in that ASSC had acted adversely against the interest of the plaintiffs by now becoming the solicitors of the opposite camp, the defendant; (iii) by continuing to act for the defendant in the 2020 suit, ASSC would place any confidential information at risk of disclosure to unauthorised persons; and I (v) the plaintiffs intended to summon the solicitor for ASSC as witnesses to give evidence.

Held (allowing encl. 9 with costs; dismissing encl. 12 with costs):

(1) ASSC should be disqualified from representing the defendant in the 2020 suit. Based on r. 3 of the Rules, ASSC would be embarrassed if they continue to represent the defendant in the 2020 suit. Based on r. 4 of the Rules, ASSC had reasons to believe that their own professional conduct was likely to be impugned in the 2020 suit if they continue to act for the defendant. ASSC's continuation to act for the defendant in the 2020 suit rendered it (i) difficult for it to maintain its professional independence or was incompatible with the best interest of the administration of justice; and (ii) impossible or difficult to maintain its professional duty under r. 35(b) of the Rules which provides that 'An advocate and solicitor shall preserve his client's confidence and this duty outlasts his employment'. Insofar as it related to Platinum Parking and Alunan Rancak, ASSC would contravene r. 5(b)(i) of the Rules which provides that 'An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings'. (para 55)

(2) The defendant failed to prove any disqualifying situation to adequately support the defendant's challenge against MHI's continuation to act for the plaintiffs. MHI may continue to act for the plaintiffs in the 2020 suit. (paras 59 & 61)

Obiter:

(1) In a situation where a solicitor acted for Party A at one stage of the litigation proceedings and later goes over to the opposite camp to act for Party A's adversary ('Party B') in the subsequent stages of the litigation proceedings involving the same subject matter in dispute, if Party A loses his case at the end of the proceedings, he would be deeply aggrieved thinking that he has been betrayed by his previous advocate who switched camps halfway in the middle of the fight. If Party B loses the case to Party A, then Party B would also be deeply aggrieved thinking that he has been betrayed by his advocate who decided to double cross-him in favour of his previous client. Either way, the ultimate loser in the long term would be the overall system of the administration of justice because the disgruntled litigants would have misconceptions against the system and would be greatly disillusioned by the system. An advocate and solicitor, being an officer of the court, has a duty to assist the court in upholding the image and integrity of the system of administration of justice and not let personal or commercial interest prevail over such important matters. (para 48)

Case(s) referred to:

Che Ahmad Hj Che Daud & Ors v. DCB Bank Bhd [2001] 5 CLJ 333 HC ***(refd)***

Dato' Sri Bala Krishnan Vellasamy & Ors v. Cityteam Media Sdn Bhd & Anor [2015] 4 CLJ 247 HC ***(refd)***

David Cheah Seng Chye v. So Miau Song & Ors [2018] 5 CLJ 83 HC ***(refd)***

Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***

Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors [2009] 4 CLJ 303 CA ***(refd)***

Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***

Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd [2008] 6 CLJ 652 HC ***(refd)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 HC ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(a), 4, 5(a), (b)(i), (ii), 28(a), 35(b)

Rules of Court 2012, O, 15 rr. 4(1), 6, O. 92 r. 4(1)

For the plaintiffs - Mohaji Selamat & Norhalijah Yusoff; M/s Mohaji Hazury & Ismail
For the defendant - Zack Randhawa; M/s Azlan Shah Sukhdev & Co

Reported by Najib Tamby

JUDGMENT

(encls. 9 & 12)

Tee Geok Hock JC:

Introduction

[1] These two appeals involve an application by the plaintiffs in encl. 9 to disqualify the defendant's solicitors from acting for the defendant in this suit and a counter-application by the defendant in encl. 12 to disqualify the plaintiffs' solicitors from acting for the plaintiffs in this suit.

[2] Enclosure 9 is the plaintiffs' application under rr. 3, 4, 5 and 35 Legal Profession (Practice and Etiquette) Rules 1978 and under O. 92 r. 4 Rules of Court 2012 which is the application to order Messrs Azlan Shah Sukhdev & Co ("law firm ASSC") to withdraw from representing the defendant in civil law case No: BA-22NCC-36-03/2020 and any matter or action related to civil law case No: BA-22NCC-36-03/2020.

[3] Enclosure 12 is the defendant's application under rr. 3, 4, 5, and 35 of the Legal Profession (Practice and Etiquette) Rules 1978 and O. 92 r. 4 of the Rules of Court 2012, namely application for an order for Tetuan Mohaji Hazury & Ismail ("law firm MHI") to withdraw from representing the plaintiffs for civil suit no: BA-22NCC-36-03/2020 and any matter or action related to civil suit no: BA-22NCC-36-03/2020.

[4] In respect of encl. 9 the following cause papers were filed and exchanged: A

(i) plaintiffs' notice of application dated 14 July 2020;

(ii) plaintiffs' affidavit in support sworn by Hashim bin Mahmud dated 14 July 2020; B

(iii) defendant's affidavit in reply sworn by Dato' Suhkdev Singh Randhawa dated 27 July 2020 ("defendant's affidavit in reply");

(iv) plaintiffs' affidavit in reply sworn by Hashim bin Mahmud dated 10 August 2020; C

(v) defendant's answer affidavit (1) sworn by Dato' Sukhdev Singh Randhawa dated 25 August 2020;

(vi) plaintiffs' affidavit in reply (1) sworn by Hashim bin Mahmud.

[5] In respect of encl. 12 the following cause papers, which were filed and exchanged, are relevant: D

(i) writ dated 2 March 2020 (hereinafter referred to as "the writ")

(ii) plaintiffs' statement of claim dated 2 March 2020 (hereinafter referred to as "the statement of claim"); E

(iii) defendant's defence and counterclaim dated 28 May 2020;

(iv) reply to defence and defence to defendant's counterclaim dated 19 June 2020;

(v) defendant's notice of application; F

(vi) defendant's affidavit-in-support affirmed by Dato' Sukhdev Singh Randhawa on 27 July 2020;

(vii) plaintiffs' affidavit-in reply affirmed by Hashim bin Mahmud on 17 August 2020; G

(viii) defendant's affidavit-in-reply affirmed by Dato' Sukhdev Singh Randhawa on 2 September 2020;

(ix) plaintiffs' affidavit-in reply (2) affirmed by Hashim bin Mahmud;

[6] On 25 November 2020, this court allowed the plaintiffs' application in encl. 9 with costs and dismissed the defendant's application in encl. 12 with costs. H

[7] The defendant has appealed against both the decisions of this court in encls. 9 and 12.

I

A **Background Facts**

[8] This Suit No. BA-22NCC-36-03/2020 ("this 2020 suit") can be considered as a continuation of or sequel to two earlier proceedings in the courts. The three inter-related proceedings are:

B (i) Shah Alam High Court Originating Summons No. BA-24NCC-30-04/2017 ("the 2017 OS");

(ii) Court of Appeal Civil Appeal No. B-02(NCC)(A)-729-04/2018 ("2018 appeal"); and

C (iii) this Suit No. BA-22NCC-36-03/2020 ("this 2020 suit").

[9] At all material times TTDI Harta Sdn Bhd (the sole defendant in this 2020 suit) had a car park operating contract with Platinum Parking Sdn Bhd as the car park operator at TTDI Harta's property. Alunan Rancak Sdn Bhd is the majority shareholder with 70% shares in Platinum Parking, while D Panetra Parking Sdn Bhd (the first plaintiff in this 2020 suit) holds 30% shares in Platinum Parking.

[10] In the 2017 OS, the first to third plaintiffs herein (1) applied for leave to file derivative action on behalf of Platinum Parking Sdn Bhd (the first defendant in the 2017 OS and the fourth plaintiff in this 2020 suit) E against TTDI Harta Sdn Bhd (the sole defendant in this 2020 suit but not cited as a co-defendant in the 2017 OS) for alleged share of income collections and for alleged damages for alleged wrongful termination of car park operating contract, (2) sued two Directors of Platinum Parking Sdn Bhd for alleged unprofessional acts and breach of duties, (3) sued Alunan Rancak F Sdn Bhd, the majority shareholder of Platinum Parking Sdn Bhd, for alleged breach of duties; and (4) sued the defendants including for discovery orders and related reliefs.

[11] In the 2017 OS, law firm ASSC was the solicitor representing Platinum Parking Sdn Bhd (the first defendant in the 2017 OS and the fourth G plaintiff in this 2020 suit) to oppose the application filed by the first to third plaintiffs to obtain court permission to take derivative action on behalf of Platinum Parking under the Originating Summons No. BA-24NCC-30-04/2017 and Civil Appeal No. B-02(NCC)(A)-729-04/2018, and also represented Platinum Parking's directors namely Mohammad Zhafri bin H Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria as well as represented Alunan Rancak Sdn Bhd, the largest shareholder of Platinum Parking, in those actions. (see the cause papers filed under the Originating Summons No. BA-24NCC-30-04/2017 (exh. "HM3"))

I

Law Relating To Disqualification Of Solicitors

[12] Rules 3, 4, 5 and 35 of the Legal Profession (Practice and Etiquette) Rules 1978 and O. 92 r. 4 of the Rules of Court 2012 provide as follow:

3. Advocate and solicitor not to accept brief if embarrassed

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises:

(i) where the advocate and solicitor finds he is *in possession of confidential information as a result of having previously advised another person in regard to the same matter*;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

4. **No advocate and solicitor to accept brief if professional conduct likely to be impugned**

No advocate and solicitor shall accept a brief in a case where **he knows or has reason to believe that his own professional conduct is likely to be impugned**.

5. **No advocate and solicitor to accept brief if difficult to maintain professional independence**

(a) No advocate and solicitor shall accept a brief if such acceptance renders or **would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice**.

(b)(i) *An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.*

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

28. **Advocate and solicitor not to appear in a case where he is a witness**.

(a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

35. **Advocate and solicitor not to abuse confidence reposed in him by client**

(a) An advocate and solicitor shall refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by the client.

(b) An advocate and solicitor shall **preserve his client's confidence and this duty outlasts his employment**.

92. **Miscellaneous**

4. **Inherent powers of the Court (O. 92 r. 4)**

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[13] In the case of *Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245, the Federal Court in delivering its judgment has stated as follow:

[61] The learned authors of *Clerk & Lindsell on Torts* (18th edn) have this to say on such conflicts of interest at paras. 8-92:

Conflicts of interest. *A lawyer owes a duty to his client not to act for another in a situation where there would be a potential conflict of interest. If such a situation arises, he must decline to act for one or the other. Such a conflict will invariably arise where one firm of solicitors represents the two parties on opposite sides in litigation. In other situations, or where a firm of solicitors has previously acted for one party and now wishes to act for another whose interests are opposed, there will be a breach of duty unless it is absolutely clear that there can be no leakage or misuse, deliberate or otherwise, of confidential information …*

[62] In the House of Lords case of *Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 1 All ER 517 Lord Millet whose judgment found favour with the other four law Lords said this at p. 526:

My Lords, I would affirm this as a basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, *for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients to act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation*.

[64] *We can say at once that this is not a valid justification for compromising on the plaintiff's interest and to betray her trust. The first and second defendants should not have accepted any form of instruction from NCT in connection with the land, even if there was "no concrete instruction" yet from NCT to buy the land and that the instruction was "merely to get a Xerox copy" of the land title, because by doing so they had evinced a clear intention to act for NCT, which was detrimental to the plaintiff's interest. They should not be serving two masters at one time.*

[14] In the case of *Dato' Sri Bala Krishnan Vellasamy & Ors v. Cityteam Media Sdn Bhd & Anor* [2015] 4 CLJ 247 in which the High Court of Kuala Lumpur in delivering its judgment has stated as follow:

> (1) The purpose, intent and object of the LPPER was to ensure that the administration of justice was not stultified or sullied by actions or conduct of solicitors who are so closely and intimately connected with a party to the suit or to a witness, such that the solicitor will not be able to maintain professional independence or **where his continued handling of the matter would be incompatible with the best interests of the administration of justice**.
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> (4) The LPPER should be broadly and sensibly construed and this court declined to give it a narrow and pedantic interpretation which would be inimical to the whole purpose and tenet of LPPER. *In disqualifying Saraswathy and the firm, the defendants would be deprived of counsel of their choice, but that was the inevitable result if the situation of the solicitor whom they have appointed was such that it violated the LPPER. It is important and imperative that the ethical standards of the Malaysian Bar are not sacrificed at the altar of expediency. Hence, Saraswathy and the firm were accordingly disqualified from acting in this matter*. (para 48)

[15] In *David Cheah Seng Chye v. So Miau Song & Ors* [2018] 5 CLJ 83 in which the High Court of Malaya Pulau Pinang in delivering its judgment has stated as follow:

> (2) *When John Khoo represented the previous trustees and the previous trustees took the stand that the Liam Hood trust was a public charitable trust, John Khoo must be privy to certain information and instructions from his client which pointed to the fact that the Liam Hood trust was in fact a public charitable trust before he advanced arguments in support of his client's position. In this circumstance, when John Khoo was engaged to represent the plaintiff in respect of the same trust, there was a great likelihood that John Khoo would be called as a witness by the defendants to give evidence as to certain documents, correspondence of cause papers prepared by him or his firm since John Khoo had acted for the previous trustees who took the position that the trust was a public charitable trust whereas he now intended to act for the plaintiff who took the position that the trust was a private trust. That would present a conflicting stance in respect of the same subject matter by the same person*. (paras 33 & 34)
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> (3) The averments of material facts made by the first to fifth defendants had not been specifically denied by the plaintiff and the plaintiff must be deemed to have admitted to those averments. *Based on these deemed admissions and the facts of the present application, as well as the fact that John Khoo had been included as one of the witnesses to be called by the defendants, there was a likelihood that John Khoo and his firm would be in a position of conflict if John Khoo were not restrained from representing the plaintiff*. (para 36)

[16] Besides that, the case of *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754 in which the High Court of Johor Bahru in delivering its judgment has stated as follow:

A [1] An advocate and solicitor is under a professional obligation to observe the standard of conduct required of members of his profession and to conform to the disciplinary rules as set out under the Legal Profession (Practice and Etiquette) Rules 1978. A failure to observe the rules will subject the advocate and solicitor to the possibility of punitive action at the instance of the client.

B [2] *Where a lawyer is required to testify, that lawyer should withdraw and entrust the conduct of the case to another lawyer. A lawyer should not simultaneously serve as Counsel and witness as to do so will put the lawyer's own credibility at stake and at issue*.

C [3] The law firm of M/s of Gana Muthusamy and Co, should not remain on record as solicitors for the plaintiff for the simple reason that Mr Gana Muthusamy owns that law firm.

[4] *The Courts have an inherent power to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. The right of a particular individual to be represented by an advocate and solicitor* D *of his own choice is not absolute as it is the Court that will determine that right*.

[8] The plaintiff was allowed to seek another advocate and solicitor from another law firm to take over the case and pursue the matter further.

[17] Besides that, in the case of *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251, in which E the Federal Court of Kuching in delivering its judgment has stated as follow:

[3] The appellants had acted in favour of the Developers, whose instructions directly conflicted with those of the respondents and had failed in their duty towards the respondents. They were a solicitor for two different clients whose interests were directly in conflict and had acted at F their own peril. The onus of showing that the conflicting interests did not prevent them from doing their duty to both clients rested firmly on the appellants.

[18] In the case of *Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd* [2008] 6 CLJ 652, the High Court of Kuala Lumpur in G delivering its judgment has stated as follow:

(2) The plaintiff's concerns were valid. It was quite conceivable that *Mr Tee as the former solicitor would have been privy to and would have acquired confidential information in that assignment. The plaintiff's claim in the present suit was predicated on that same settlement agreement. Potentially Mr Tee might have* H *to be called as a witness for the plaintiff in the dispute over that agreement*. (para 9)

(3) *Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 prohibited counsel to act in a case where he would be a potential witness of material dispute of facts. Based on the facts herein, Mr Tee was involved in arriving at a settlement agreement that he drafted and advised the plaintiff on. Mr Tee's role in the settlement* I *agreement would in all probability potentially make him a witness of material and disputed facts. It followed that this was a case in which "an advocate and solicitor has reason to believe that he will be a witness in respect of a material and disputed question of fact" under the first limb of r. 28(a).* (paras 10, 13 & 14)

(6) In the face of the clearly worded rr. 3, 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978, it was difficult to imagine how Mr Tee had not run foul of any of their provisions. The said rules were clear on the point and were designed to prevent a situation of conflict of interest. They were not intended to give some technical interpretation as to whether the prohibitions in those rules were only in respect of accepting briefs or actually appearing in court. It would not matter that it referred to accepting briefs only. The intention was crystal clear. A conflict of interest situation must be avoided. Professionalism and dignity of the profession must be maintained. (para 22)

[19] Besides that, in the case of *Che Ahmad Hj Che Daud & Ors v. DCB Bank Bhd* [2001] 5 CLJ 333 the High Court of Kota Bharu in delivering its judgment has stated as follow:

[1] It is clear that r. 5(a) of the Rules 1978 prohibits a counsel to act for all parties in a case. This is because there will be a conflict of interest and the counsel will not be able to maintain professional independence. Also, it will not be in the best interest in the administration of justice. The appellant's counsel herein represented all the parties concerned in the preparation of the loan agreement. That was invalid by virtue of r. 5(a) of the Rules 1978 as it would be difficult for the said counsel to maintain its professional independence.

[20] In *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303; [2009] 4 MLJ 671 in which the party in this case has referred to the case as follow:

Mr Alan Wong referred to the case of *Prince Jefri Bolkiah v. KPMG (a firm)* [1990] 2 AC 222, where Lord Millett said: In *Rakusen*'s case (*Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch 831) the Court of Appeal founded the jurisdiction on *the right of the former client to the protection of his confidential information. This was challenged by counsel for Prince Jefri, who contended for an absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter*. In the course of argument, however, he modified his position, accepting that there was no ground on which the court could properly intervene unless two conditions were satisfied: (i) that the solicitor was in possession of information which was confidential to the former client, and (ii) that such information was or might be relevant to the matter on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter.' On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information. My Lords, I would affirm this as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot

without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[2009] 4 MLJ 671 at 678 …

Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. *The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.*

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish

(i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and

(ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.

Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters.

But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case. In this respect also we ought not in my opinion to follow the jurisprudence of the United States. …

It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

(emphasis added)

[21] Further, the Court of Appeal of Malaysia in delivering its judgment for the case of *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303; [2009] 4 MLJ 671 has stated as follow:

> [16] I accept the above principles of law. Two important propositions emerge. First, for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. The facts of *Hardless v. Hardless* AIR 1932 Allahabad 536 provide a good example as to how the principle is to be applied. In that case, the respondent to a divorce petition wrote to a counsel referring to complaints that he had against his wife and stating that he desired to take action so that he might obtain custody of the children. However, the letter did not definitely engage counsel's services. Later, the said counsel was engaged by the petitioner to act for her and the respondent husband made application to prohibit him from acting in the matter. The court dismissed the application and held as follows:
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> A great ideal has to take place before counsel can be said to be engaged by a party to a suit, so that it would be unprofessional for him to appear on the other side. *In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party*. …
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> *Second, it depends on the facts of each case whether confidential information was conveyed. In order to bar a solicitor or other fiduciary from acting, the applicant must place before the court full particulars of the relevant confidential information that was allegedly disclosed to the solicitor or fiduciary*. Mere general or vague allegations are insufficient. As was stated in *State v. Lalit Mohan Nanda* AIR 1961 Orissa 1:
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> … the onus of proving that confidential information was conveyed lies heavily upon the applicant.

[22] From the statutory provisions and decided cases, the following principles can be summarised regarding the law on disqualification of an advocate and solicitor from acting for a litigant in a court case:

(i) An advocate and solicitor should not act for a party in a situation where he is or would be embarrassed: sub-r. 3(a) of the Legal Profession (Practice and Etiquette) Rules 1978. An embarrassment arises – (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter; or (ii) where there is some personal relationship between him and a party or a witness in the proceedings. The first limb (i) serves to protect the confidentiality of the information confided in the advocate and solicitor by a client or a previous client, while the second limb (ii) is a specific application of the principle against bias or likelihood of bias under the second pillar of the rules of natural justice, see *Perak Hanjoong Simen* case (*supra*), *Mirza Mohamed Tariq Beg* case (*supra*).

(ii) An advocate and solicitor should not act for a party in a situation where he knows or has reason to believe that his own professional conduct is likely to be impugned in proceeding: r. 4 of the Legal Profession (Practice and Etiquette) Rules 1978. In our adversarial system of administration of justice, much importance is placed upon the need for an advocate as an officer of the court to act without fear or favour while advocating his client's case; this he cannot do or is regarded as unable to do if his own professional conduct is likely to be impugned in the course of the very case he appears as an advocate;

(iii) An advocate and solicitor should not act for a party in a situation where it renders or would render it difficult for him to maintain his professional independence: first limb of sub-r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978. In our adversarial system of administration of justice, much importance is placed upon the need for an advocate as an officer of the court to act with professional independence before the court, and the greater interest of acting with professional independence outweighs the individual interest of an advocate and solicitor or the individual preference of his client in question. See *Ng Siew Lan v. John Lee Tsun Vui* (*supra*) (Federal Court).

(iv) An advocate and solicitor should not act for a party in a situation where it is incompatible with the best interest of the administration of justice: second limb of sub-r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978. This second limb of sub-r. 5(a) has a wide ambit which extends beyond the ambits of the other rules or sub-rules on specific situations of disqualification, and it is intended to cover other situations which the court finds it is incompatible with the best interest of the administration of justice for an advocate and solicitor to act or accept a brief notwithstanding that the situation does not fall within the ambit of any of the specific situations in other rules or sub-rules. In sub-r. 5(a), the primary concern is the need to protect and preserve the image, reputation and integrity of the overall system of administration of justice in the eyes of the members of the public – the far greater interest of the overall system of administration of justice prevails over the individual interest of an advocate and solicitor or the individual preference of his client in question. See *Dato' Sri Bala Krishnan Vellasamy* case (*supra*), *David Cheah Seng Chye* case (*supra*), *Syarikat Pengangkutan Sakti* case (*supra*), *Che Ahmad Hj Che Daud* case (*supra*).

(v) "An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings": sub-r. 5(b)(i) of the Legal Profession (Practice and Etiquette) Rules 1978. The exceptional situation which permits an

advocate and solicitor to act in spite of conflict of interests is laid down in part (ii) of sub-r. 5(b) which stipulates that "(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting". The word "embarrassed" in sub-r. 5(b) bears the same meaning as the same word in r. 3. It is to be noted that the written consent of a previous client and the absence of embarrassment under r. 3 are cumulative requirements for a case to fall within this exception to the prohibition. It is also to be clarified that the underlined word "for" in sub-r. 5(b)(i) is used in contrast with the word "against", and it is a confirmation of the practice and etiquette that there is no law or rule to prohibit an advocate and solicitor from acting against a party in an earlier proceeding or at an earlier stage of the proceedings and then at a subsequent stage act for that same party in the same action or suit, provided doing so would not cause the advocate and solicitor to contravene any other etiquette rule or sub-rule. This absence of such reverse prohibition is consistent with the procedural rules under O. 15 r. 4(1) of the Rules of Court 2012 which requires a person whose interest or rights jointly with the plaintiff's interest or rights but who has refused to be joined as a co-plaintiff in a court suit has to be included as a co-defendant in the court suit, culminating with the likely result that if such dissenting person changes his mind subsequently and gives his consent to be joined and added as a co-plaintiff pursuant to O. 15 r. 6, then the same advocate and solicitor who has acted for the original plaintiff can continue to act for all the co-plaintiffs. See *Ng Siew Lan* case (*supra*), *Messrs Yong & Co* case (*supra*).

(vi) "An advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests": sub-r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978. The phrase "reason to believe" refers to an objective state of mind of a reasonable advocate and solicitor who is an objective observer, and it should not refer to a subjective state of mind of the particular advocate and solicitor in question. Having reason to believe that something will happen in future refers to the present likelihood that it will happen in future, but it does not mean certainly that it will happen in future. There are many time when a person objectively had reason to believe that something will happen in future but when the future time comes that something does not happen. See *Perak Hanjoong Simen* case (*supra*) wherein the learned judge used the phrase "would in all probability potentially make him a witness of material and disputed facts".

(vii) An advocate and solicitor should not act for a party in a situation would render it practically impossible or difficult to perform his professional duty under sub-r. 35(b) of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "An advocate and solicitor shall preserve his client's confidence and this duty outlasts his employment". Our adversarial system of administration of justice places much importance to the need to protect and preserve the clients' trust and confidence in their advocates and solicitors so much so that solicitor-client communications enjoyed the privilege from disclosure. In a situation where an advocate and solicitor's acting or continuing to act for a party would involve a breach or likely breach of the confidence reposed in him by his existing client or his previous client, the law intervenes to preserve such confidence by disqualifying the advocate and solicitor from acting or continuing to act in such situation.

Nature Of Plaintiffs' Claims And Allegations Against The Defendant In This 2020 Suit

[23] The plaintiffs in this 2020 suit allege that the defendant intentionally violated the terms agreed in the offer letter dated 25 May 2011 by sending a notice of termination for the management and operation of the Plaza TTDI parking site dated 20 April 2016 to the fourth plaintiff with one month notice only from the date the notice was sent whereby the notice of termination for the management and operation of the parking lot Plaza TTDI dated 20 April 2016 ("the notice of termination") was received by the fourth plaintiff only on 26 April 2016. It is the plaintiffs' contention that the defendant's reason for issuing the termination notice is that the contract has expired and there is no extension for another three years while the extension contract for two years has been running for almost two years and will only expire on 31 July 2017.

[24] According to the plaintiffs, they were never worried or suspected something bad like unlawful termination would happen after almost two years extension of contract occurred because based on cl. 10.5 of the shareholder's agreement dated 26 April 2010 which clearly states that "Business decision of the JV company shall always be taken in the best interest of the JV company as a whole and shall be impartial to the interest of the JV parties." (Refer to shareholder agreement dated 26 April 2010 exh. "HM-5")

[25] It is the argument of the plaintiffs that therefore the estoppel principle applies to the defendant especially the defendant where, as alleged by the plaintiffs, the defendant through their actions, conversations and actions have given confidence, promise, representation and trust to the plaintiffs and all users of the parking site at Plaza TTDI that the parking management contract at Plaza TTDI has been extended for another three years until 31 July 2017 including revising the price or parking rate on 31 December 2014 after the first contract period expired.

[26] Also, the plaintiffs argue that unlawful termination of contract through the notice of termination dated 20 April 2016 completely prejudices the rights of plaintiffs who have worked hard to manage, administer and provide the best service at the parking lot at TTDI Plaza where it has benefited the defendant even after the first period of the contract has expired and after the contract has been extended on 1 August 2014 until 31 July 2017. The plaintiffs stated here that there is no need to issue a written request notice for the purpose of extension of the contract based on the offer letter dated 25 May 2011 as the defendant's own representative and manager at that time had allowed and given permission for another three years extension of the contract to the fourth plaintiff and there is no clause in the offer letter stating that written notice is required for the extension of the contract in which Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal who has authority over the defendant, who is also the director for the fourth plaintiff has approved and agreed for an extension of another three years for the contract between the fourth plaintiff and the defendant through the action of Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal who allowed the collection of parking tickets at Plaza TTDI for almost two years after 31 July 2014 and thereafter allowed the money to be deposited directly into the fourth plaintiff's account. (see offer letter dated 25 May 2011 exh. "HM-6).

[27] It is alleged by the plaintiffs that the defendant unlawfully sent a letter dated 20 April 2016 to the fourth plaintiff which is the notice of termination of management and operations of Laman Seri Business Park Parking Site in which the fourth plaintiff only received the notice of termination *via* e-mail from Sumila Abdullah on behalf of the defendant's company on 26 April 2016 which stated that the period of operation of the parking site has expired and the management has decided not to renew the operation of the parking site. According to the plaintiffs' assertions, the defendant also stated through the termination notice that the fourth plaintiff was given two months from the date of the termination notice to vacate the parking site and surrender to the defendant before or on 19 June 2016. (Refer termination contract and operation Laman Seri Business Park dated 20 April 2016 exh. "HM-23")

[28] The plaintiffs allege that the defendant is aware of the circumstances and the fact that the parking management and operations contract at Laman Seri Business Park between the defendant and the fourth plaintiff has been extended for the next three years (after the expiry of the first three years of the contract) and the implementation of parking management work has been running for almost two years and will only expire on 30 November 2017 for the management and operation of Laman Seri Business Park parking site.

[29] In addition, so the arguments of the plaintiffs continue, the two-month notice for the Laman Seri Business Park parking site is in conflict with the three-month notice set out in para. 8.0 of the offer letter and this makes it an invalid and void notice. According to the plaintiffs' assertion, many formal and informal and daily meeting sessions were held such as one of the

meetings on 28 September 2015 which was attended by representatives from defendant's company namely the chief financial officer, Mr Choo Chee Beng and executive director, Mr Idham Mohd Hashim and representatives from the fourth plaintiff's company. (Refer minute of meetings dated 28 September 2015 exh. "HM-7").

[30] Subsequently, the fourth plaintiff has sent a letter dated 10 May 2016 to the defendant stating that the notice of termination of management and operations of the parking site dated 20 April 2016 is invalid as there is no solid reason for such termination. The plaintiffs alleged that the issue of expired contracts is also flawed as both parties have agreed to continue and extend the contract for another three years until 30 November 2017 after the expiry of the first period which is on 30 November 2014. This, according to the plaintiffs' arguments, is based on the actions of both parties in which after 1 December 2014, the fourth plaintiff has resumed the responsibility of the fourth plaintiff to manage the operation of the parking site and several meetings were held between the fourth plaintiff and the defendant in addition the communication between the fourth plaintiff and the defendant including via email and correspondence related to the management and operation of the parking site. Capital has also been issued to extend the rental period of equipment for use and operation at the parking lot. (Refer letter dated 10 May 2016 exh. "HM-10").

[31] The fourth plaintiff also explained to the defendant through the letter dated 10 May 2016 that if the defendant wishes to terminate the agreement between the fourth plaintiff and the defendant, the defendant must give three months written notice to the fourth plaintiff based on the terms and conditions in the offer letter dated 9 November 2011. However, referring to the notice of termination from the defendant dated 20 April 2016, the defendant only gave two months notice starting from the date of the notice of termination. (Refer offer letter dated 9 November 2011 exh. "HM-20").

[32] Shortly before 1 June 2016, a writ of summons was issued on behalf of Platinum Parking (the fourth plaintiff) against the defendant TTDI Harta.

[33] Subsequently on 1 June 2016, the plaintiffs' solicitor and the fourth plaintiff received a letter from law firm ASSC claiming to represent the majority shareholders of the fourth plaintiff namely Alunan Rancak and the directors of the fourth plaintiff namely Mohammad Zhafri bin Jaafar and Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal whereby in the letter, the solicitor claimed that the fourth plaintiff through the majority shareholders had accepted unanimously without any objection the termination letter dated 20 April 2016 issued by the defendant. It is the plaintiffs' contention that the acceptance of the termination letter is a sign of surrender before the war actually begins as there is a common business entity interest between the parties which greatly prejudices the plaintiffs and the

fourth plaintiff disregarding cl. 10.5 of the shareholder's agreement dated 26 April 2010. (Refer letter from law firm ASSC dated 1 June 2016 exh. "HM-15").

[34] The plaintiffs' solicitors at that material time, law firm MHI, responded to law firm ASSC's solicitor's letter through law firm MHI's letter dated 10 June 2016 explaining in detail how the decision and stance of Mohammad Zhafri bin Jaafar and Sheikh Mohd and Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal against the termination letter dated 20 April 2016 issued by the defendant against the fourth plaintiff is inconsistent and contradicts to cl. 10.5 of the shareholders agreement dated 26 April 2010 due to a clear neglect and breach of responsibility in the contract and violation of fiduciary duties as directors of the fourth plaintiff where the main duty of the directors is to protect the interests of shareholders including the first plaintiff and the interests of the company in particular ie, the fourth plaintiff. (Refer letter from law firm MHI dated 10 June 2016 exh. "HM-16").

[35] On or about 30 December 2016, the plaintiffs' solicitors on behalf of the plaintiffs sent a 30-day notice of claim to the directors and shareholders of the fourth plaintiff namely Mohammad Zhafri bin Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal, Alunan Rancak and Mohammad Nazreen and also to the fourth plaintiff (refer letter of demand dated 30 December 2016 from Messrs Mohaji Hazury & Ismail exh. "HM-17").

[36] The notice of claim dated 30 December 2016, among others, urged Alunan Rancak Sdn Bhd and the directors of Alunan Rancak Sdn Bhd who are also the directors in the fourth plaintiff (namely Mohammad Zhafri bin Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria) to reconsider their decision to unconditionally accept the termination of the management and operation of the parking site made by the defendant and demand that they on behalf of the fourth plaintiff withdraw their agreement to accept the termination of the contract. Apart from that, the plaintiffs also demanded to be given written permission from the majority shareholder, namely Alunan Rancak Sdn Bhd for the fourth plaintiff to take action against the defendant, among others, for unlawful termination of the management and operation of the parking site, defendant's failure to compensate the direct operating costs, defendant's failure to compensate the capital, defendant's failure to pay the profit to fourth plaintiff according to the agreed ratio and loss due to unlawful termination of contract.

[37] Plaintiffs' solicitor subsequently received a letter dated 26 January 2017 from law firm ASSC informing them that they had acted as the solicitor of majority shareholders of the fourth plaintiff, Alunan Rancak Sdn Bhd and for other directors in the fourth plaintiff namely Mohammad Zhafri bin

Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria who informed, among others, that the defendant has never extended the contract of operation and management of the parking site for the next three years. In which the majority shareholder, Alunan Rancak Sdn Bhd and the other directors in the fourth plaintiff, Mohammad Zhafri bin Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria informed through their solicitors that they would not entertain or meet the demands of the plaintiffs. (Refer letter from law firm ASSC dated 26 January 2017 exh. "HM-18")

[38] As a result of Mohammad Zhafri bin Jaafar's email and the letter of the defendant's solicitor, the writ of summons and notice of claim of Platinum Parking could no longer be continued and they were left to expire. It became necessary then to change to derivative action in the 2017 OS brought by the first plaintiff, the second plaintiff and the third plaintiff to protect the interests of the fourth plaintiff.

[39] Due to the alleged wrongdoings of the defendant as stated above, the plaintiffs instructed the plaintiffs' solicitors, law firm MHI to send a notice of claim dated 21 July 2017 to the fourth plaintiff's majority shareholder, Alunan Rancak Sdn Bhd and to the directors in the fourth plaintiff namely Mohammad Zhafri bin Jaafar, SM Faliq bin Tan Sri SM Nasimuddin Kamal and to Mohamad Nazreen Zakaria. (Refer notice of demand dated 21 July 2017 exh. "HM-26").

[40] It is the plaintiffs' case that since law firm ASSC not only represented the fourth plaintiff, but also represented the three directors in the fourth plaintiff as well as the largest shareholder in the fourth plaintiff for the 2017 OS and the 2018 appeal filed by the first to third plaintiffs previously, the plaintiffs asserted that the fourth plaintiff has provided confidential communication on the basis of solicitor and client ("client's solicitor privilege") regarding all matters relating to the fourth plaintiff including the matter of the fact of alleged unlawful termination by the defendant against the fourth plaintiff which is the subject-matter of this 2020 suit.

[41] The plaintiffs also referred to documents to show that the fourth plaintiff has also been required to pay legal fees amounting to RM132,200 for the services of law firm ASSC who represented the fourth plaintiff (first defendant for the 2017 OS) and the largest shareholder of fourth plaintiff namely Alunan Rancak Sdn Bhd and three directors of fourth plaintiff namely Mohammad Zhafri bin Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria. (see inter-office memo dated 6 May 2019 from Naza TTDI Sdn Bhd to Muhammad Zhafri Jaafar with its attachment and letter from law firm ASSC to fourth plaintiff dated 29 April 2019 and 22 January 2018 exh. "HM-2").

[42] According to the plaintiffs, one of the directors in the present defendant's company (TTDI Harta) is Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal who is also one of the directors in the fourth plaintiff (Platinum Parking) and also one of the directors in Alunan Rancak Sdn Bhd which is the largest shareholder in the fourth plaintiff, and Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal was the third defendant in the 2017 OS and the third respondent in the 2018 appeal filed by the first to third plaintiffs.

Application Of Legal Principles To The Facts And Factual Assertions In This 2020 Suit In Connection With Enclosure 9

[43] Summed up briefly, the gravamina of the plaintiffs' complaints in this 2020 suit include the following items:

(i) TTDI Harta allegedly failed to account for Platinum Parking's share of the incomes collected from the car parks;

(ii) the premature termination by TTDI Harta of the car park operation Contract was allegedly wrongful;

(iii) despite the plaintiffs' dispute of TTDI Harta's termination of the contract, Platinum Parking's directors nominated by the majority shareholder Alunan Rancak purported to accept the purported termination without any objection or protest;

(iv) the majority shareholder Alunan Rancak and its nominee directors allegedly acted unprofessionally and in breach of their duties;

(v) when the first to third plaintiffs first issued a writ of summons and notice of demand on behalf of Platinum Parking against TTDI Harta, Alunan Rancak and its nominee directors through law firm ASSC raised objection on ground of lack of authorisation for the first to third plaintiffs to instruct solicitors on behalf of Platinum Parking to sue TTDI Harta;

(vi) faced with such objection *via* law firm ASSC's letter, the first to third plaintiffs asserted that they had no choice but to let the first writ of summons lapse;

(vii) as a result, the first to third plaintiffs asserted that they then filed the 2017 OS for leave to take out a derivative action on behalf of Platinum Parking against TTDI Harta;

(viii) in the 2017 OS for leave for derivative action, the co-defendants were Platinum Parking, Alunan Rancak and directors nominated by Alunan Rancak but TTDI was not cited as a party yet;

(ix) in the 2017 OS, law firm ASSC represented all the co-defendants including Platinum Parking and its directors who were nominees of Alunan Rancak;

(x) after rival arguments and submissions, the High Court dismissed the first to third plaintiffs' leave application in the 2017 OS;

(xi) on appeal to the Court of Appeal in the 2018 appeal, law firm ASSC again represented all the respondents including Platinum Parking and its directors who were nominees of Alunan Rancak;

(xii) the Court of Appeal, in allowing the appeal, granted leave for the first to third plaintiffs to file the derivative action on behalf of Platinum Parking against TTDI Harta;

(xiii) in this 2020 suit filed in pursuance of the leave granted by the Court of Appeal, the first to third plaintiffs jointly with Platinum Parking as the fourth plaintiff, are suing TTDI Harta as the sole defendant in respect of claims and disputes in respect of the contract and the purported termination;

(xiv) one of the main arguments of the plaintiffs in this 2020 suit is the contention that the purported termination of the contract by TTDI Harta is allegedly wrongful.

[44] According to the plaintiffs, the letter of the defendant's solicitor dated 1 June 2016 is one of the "embarrassment" that will happen to law firm ASSC if they continue to represent the defendant considering when law firm ASSC represented Platinum Parking Sdn Bhd that is the fourth plaintiff in a previous action, law firm ASSC had taken the stance that the notice of termination issued by the defendant against the fourth plaintiff and the termination of the contract of operation and management of the parking site between the plaintiffs and the fourth defendant is a valid termination on the allegation that the defendant has the power and discretion to either extend or terminate the contract as the defendant is the building and site of the parking lot and claims that the fourth plaintiff through the majority shareholder has accepted unanimously without any objection to the closing letter dated 20 April 2016 issued by the defendant while at all material times, there are strong reasons for the fourth plaintiff to dispute and challenge the letter of termination dated 20 April 2016 issued by the defendant as outlined in the letter of the plaintiffs' solicitor and the fourth plaintiff dated 27 May 2016 whereby the stance of law firm ASSC on this issue while representing the fourth plaintiff in the previous action clearly contradicted the fourth plaintiff's stance now after the Court of Appeal gave permission to the first plaintiff up to the third plaintiff by order dated 4 February 2020 to take derivative action on behalf of the fourth plaintiff to challenge, among others, the termination of the operating contract and management of the parking site made by the defendant through the notice of termination dated 20 April 2016 in which such termination is invalid and made unlawfully. In light of the entire background facts and the surrounding circumstances leading to the

filing of this 2020 suit, this court agrees with the plaintiffs that law firm ASSC would be embarrassed by the position taken by them on behalf of the defendants in the 2017 OS (including Platinum Parking, the fourth plaintiff herein).

[45] When the Court of Appeal by order dated 4 February 2020 allowed the first to third plaintiffs to take derivative action on behalf of Platinum Parking (the fourth plaintiff in this 2020 suit), this means that the stance of the fourth plaintiff as brought and communicated by law firm ASSC when representing fourth plaintiff in the 2017 OS to oppose the application for permission to take derivative action was considered as erroneous and/or wrong by the court. If law firm ASSC were to continue acting for TTDI Harta in this 2020 suits, it would place law firm ASSC in a position of conflict of interest or embarrassment when handling this core issue of validity of the purported termination. The solicitor of TTDI Harta will have to argue TTDI Harta's case as to whether or not the purported termination was valid, including the issue whether or not Platinum Parking has accepted the termination without any objection and whether Platinum Parking was estopped from challenging the validity of the termination in view of various acts or conduct including law firm ASSC's letter dated 1 June 2016. On the one hand, if law firm ASSC for whatever reason does not pursue the argument of acceptance by conduct and estoppel on behalf of TTDI Harta, law firm ASSC would have failed in their professional duties to their clients to defend their client's case without fear or favour. On the other hand, if law firm ASSC pursues the argument of acceptance by conduct and estoppel on behalf of TTDI Harta, law firm ASSC would likely be a witness as to why they wrote the 1 June 2016 letter, what transpired between the defendants in the 2017 OS and the law firm ASSC which led to the issuance of such letter, whether the said letter was issued due to unprofessional act or breach of duties of some director(s) of Platinum Parking as alleged by the first to third plaintiffs, etc. This would place law firm ASSC in a situation of conflict of interest and of embarrassment.

[46] If law firm ASSC were allowed to represent TTDI Harta in this 2020 suit brought by the plaintiffs including the fourth plaintiff Platinum Parking, this will result in a conflict of interest in that the law firm ASSC, who was formerly the solicitor of Platinum Parking (first defendant in the 2017 OS) and the largest shareholder of fourth plaintiff namely Alunan Rancak Sdn Bhd and three directors of fourth plaintiff namely Mohammad Zhafri bin Jaafar, Sheikh Mohd Faliq bin Sheikh Mohd Nasimuddin Kamal and Mohamad Nazreen bin Zakaria in the 2017 OS and the 2018 appeal, has now become the solicitor at the opposite of the camp acting adversely against the interests of their previous clients. Bearing in mind that the plaintiffs' success or failure in this 2020 suit would also mean financial benefits or prejudice to Platinum Parking as well as Platinum Parking's majority shareholder

Alunan Rancak. In this 2020 suit, law firm ASSC as the previous solicitor of Platinum Parking and Alunan Rancak in the 2017 OS has now in this 2020 suit become the champion of TTDI Harta's cause adverse to Platinum Parking and Alunan Rancak's position in the main fight in the 2020 suit. Viewed objectively by a layman bystander, the bystander would probably exclaim with shock and bewilderment that his advocate in earlier stages of the litigation proceedings has now become his adversary's advocate to fight him, his ex-client, in the later and final stages of the litigation proceedings.

[47] The 2017 OS was strenuously contested, and the contest continued until the Court of Appeal stage. In such lengthy proceedings or strenuous contests, it is reasonable to infer that some confidential information has likely been disclosed to law firm ASSC by director(s) of Alunan Rancak and/or by Platinum Parking's director(s) nominated by Alunan Rancak. However, the plaintiffs have failed to discharge the burden of proof of law firm ASSC's possession of confidential information to the standard required by law: see Federal Court's decision in *Mirza Mohamed* case (*supra*). This court therefore reject the plaintiffs' submission that the law firm ASSC continuing to act for TTDI Harta in this 2020 suit until the end of full trial would probably place any confidential information at likely risk of disclosure to unauthorised person.

[48] In our adversarial system of administration of justice, the litigants know or expect their solicitors to advocate their respective causes to the best of the solicitors' abilities and place trust and confidence in the independent dedication and professionalism of their respective solicitors. In a situation where a solicitor acted for party A at one stage of the litigation proceedings later goes over to the opposite camp to act for party A's adversary in the subsequent stages of the litigation proceedings involving the same subject-matter in dispute, if party A loses his case at the end of the proceedings, he would be deeply aggrieved thinking that he has been betrayed by his previous advocate who switched camp halfway in the middle of the fight; however, on the other hand, if party A's adversary loses the case to party A, then party A's adversary would also be deeply aggrieved thinking that he has been betrayed by his advocate who decided to double-cross him in favour of the previous client. Either way, the ultimate loser in the long term would be the overall system of administration of justice because the disgruntled litigants would have misconceptions against our system of administration of justice and would probably be greatly disillusioned with our system. An advocate and solicitor, being an officer of the court, has a duty to assist the court in upholding the image and integrity of the system of administration of justice, and not to let personal or commercial interest prevail over such important matters.

[49] This court cannot ignore the plaintiffs' submission that "the conflict of interest can also be seen when the latest Companies Commission of Malaysia (SSM) search finds that the defendant is owned by Ekspedisi Nikmat Sdn Bhd and the search for Ekspedisi Nikmat Sdn Bhd shows that it is owned by Naza Corporation Holdings Sdn Bhd. SSM search also shows Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal who is one of the directors of the fourth plaintiff and in Alunan Rancak Sdn Bhd is the Director of Ekspedisi Nikmat Sdn Bhd which has the present defendant. SSM search also shows that Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal is the Director of Naza Corporation Holdings Sdn Bhd. Further search shows that Naza Corporation Holdings Sdn Bhd is owned by Naza Corporation Holdings Ltd which is not registered under the Companies Commission of Malaysia. Thus, law firm ASSC will represent the defendant whereby one of the directors and shareholders is also the director of the fourth plaintiff (shares *via* Alunan Rancak). (Refer company search of TTDI Harta Sdn Bhd, Ekspedisi Nikmat Sdn Bhd, and Naza Corporation Holdings Sdn Bhd exh. "HM-4"). This submission of the plaintiffs' counsel reinforces the reality and likelihood of the concerns and considerations stated in the immediately foregoing paragraph.

[50] In the plaintiffs' submission, it is also stated that the plaintiffs also intend to summon solicitor from law firm ASSC as witnesses to give evidence to inform the court as to which of the fourth plaintiff's organisation gave the order to accept the unlawful termination of the defendant as the largest shareholder of the fourth plaintiff after the writ of summons and notice of claims were filed in court as such action contradicts to cl. 10.5 of the shareholder's agreement dated 26 April 2010 which clearly and firmly states that "business decision of the JV company shall always be taken in the best interest of the JV company as a whole and shall be impartial to the interest of the JV parties.". In the entire circumstances of this case, this court cannot rule out the likelihood of lawyer(s) from law firm ASSC being subpoenaed as a relevant witness in this case. In the premises, the plaintiffs have established on a balance of probabilities that the continuation of law firm ASSC in representing TTDI Harta would involve them in a conflict of interest.

[51] Furthermore, one of the directors in TTDI Harta is Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal who is also one of the directors in the fourth plaintiff (Platinum Parking) and also one of the directors in Alunan Rancak Sdn Bhd (the largest shareholder of the fourth plaintiff). In the 2017 OS and in the 2018 appeal, allegations of unprofessional conduct and breaches of duties were made by the first to third plaintiffs against Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal (the third defendant in the 2017 OS and the third respondent in the 2018 appeal). Coupled with the fact that Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal is the common director in opposite sides in

this 2020 suit (ie, the fourth plaintiff and the defendant herein) and the law firm ASSC by their 1 June 2016 letter stated the position on behalf of defendants including Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal regarding the acceptance of the termination which also forms one of the main issues in dispute in this 2020 suit, it is likely that law firm ASSC's continuation as solicitor or advocate for TTDI Harta in this 2020 suit would lead them into embarrassment, conflict of interests and/or being called as a witness in this 2020 suit.

[52] A further factor which needs to be considered is the fact that the fourth plaintiff has also been required to pay legal fees or at least a part thereof amounting to RM132,200 for the services of law firm ASSC representing defendants in the 2017 OS including the fourth plaintiff (first defendant in the 2017 OS). The documents exhibited in the cause papers show that eventually law firm ASSC received from Platinum Parking a sum of RM32,800 as agreed fee and disbursements in respect Platinum Parking's portion for law firm ASSC's services in the 2017 OS and the 2018 appeal. When viewed objectively, it is contrary to the public's perception of solicitors' professionalism if the solicitor who has been paid by party A for his professional services in an earlier stage of the litigation becomes, at a later stage of the litigation over the same subject-matter, the advocate for the party A's adversary to fight against party A. This by itself renders it incompatible with the best interest of the administration of justice for law firm ASSC to continue acting for TTDI Harta in this 2020 suit. In the plaintiffs' submission in opposition to the defendant's counter-application in encl. 9, the plaintiffs have highlighted the discussions and arguments between law firm ASSC and Platinum Parking regarding the amount of legal fees Platinum Parking has to pay law firm ASSC, regarding law firm ASSC's insistence that each of the co-defendants in the 2017 (including Platinum Parking) has to be jointly and severally responsible for the entire legal fees, regarding Platinum Parking's proposal to pay 20% of the total fees to law firm ASSC on ground that each co-defendant should bear equal portion of the fees, the actual payment of RM32,800 by Platinum Parking to law firm ASSC as agreed fee, etc. It is also incompatible with the interest of the administration of justice to let an advocate and solicitor, who holds Platinum Parking responsible or at least partly responsible for the legal fees for legal professional services or in fact collects a substantial sum of fee from Platinum Parking for services rendered in earlier stages of the litigation proceedings, continue to act for Platinum Parking's adversary in subsequent stages of the litigation proceedings over the same subject-matter to fight against Platinum Parking's cause.

[53] In the circumstances, this court finds and concludes that it would be contrary to the etiquette rules and the principles of law for the law firm ASSC to act as solicitors or advocates for TTDI Harta in this 2020 suit.

[54] The abovementioned analysis and findings sufficiently dispose of the important issues in connection with the plaintiffs' application in encl. 9 to disqualify the law firm ASSC. As such, it is unnecessary for this court to deal with the other minor or ancillary arguments of the parties in respect of encl. 9 application.

[55] In the circumstances, this court finds and concludes that the law firm ASSC should be disqualified from representing TTDI Harta in this 2020 suit because:

(i) the law firm ASSC would be embarrassed if they continue to represent TTDI Harta in this 2020 suit: r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978;

(ii) viewed objectively, the law firm ASSC have reason to believe that their own professional conduct is likely to be impugned in this 2020 suit if they continue to act for TTDI Harta here: r. 4 of the Legal Profession (Practice and Etiquette) Rules 1978;

(iii) the law firm ASSC's continuation to act for TTDI Harta in this 2020 suit renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice: sub-r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978;

(iv) insofar as it relates to Platinum Parking and Alunan Rancak, the law firm ASSC would contravene sub-r. 5(b)(i) of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings"; and

(v) the law firm ASSC's continuation to act for TTDI Harta in this 2020 suit would render it practically impossible or difficult to perform his professional duty under sub-r. 35(b) of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "An advocate and solicitor shall preserve his client's confidence and this duty outlasts his employment".

Application Of Legal Principles To The Facts And Factual Assertions In This 2020 Suit In Connection With Enclosure 12

[56] Enclosure 12 is the defendant's counter-application to disqualify law firm MHI from representing the plaintiffs in this 2020 suit.

[57] In this connection, a striking factual difference between the position of law firm MHI and the position of law firm ASSC is that in the 2017 OS and the 2018 appeal, TTDI Harta was not a party thereto. Arising from such

striking difference in factual feature, the cause papers in this 2020 suit also show the differences in the following facts regarding the positions of law firm MHI and law firm ASSC as summarised in the table below:

	Law Firm ASSC	Law Firm MHI
1.	Acted for Platinum Parking ("PPK") in the 2017 OS.	Did not act for TTDI Harta ("TTH") in the 2017 OS.
2.	Acted for PPK in the 2018 Appeal.	Did not act for TTH in the 2018 Appeal.
3.	Holds PPK responsible for fees in services rendered to PPK in earlier stages of proceedings.	Do not claim any fee nor render any service to TTH in any earlier stage of proceedings.
4.	Had confidential information regarding PPK confided to them.	Do not have any confidential information confided to them.
5.	Professional conduct likely to be impugned in connection with their letter dated 1 June 2016.	No likelihood of any professional conduct being impugned in connection with any matter in this 2020 Suit.
6.	Switch from acting for PPK in earlier stages to acting against PPK in subsequent stages of the proceedings.	No switch from acting for a party to acting against the same party later in the proceedings.
7.	Likely to be called as a relevant witness.	No likelihood of being called as a relevant witness.
8.	Embarrassment of presenting argument for or against existing client and ex-client in the same subject-matter.	No embarrassment of presenting argument for or against existing client and ex-client in the same subject-matter.
9.	Involved in conflict of interests.	No conflict of interests.

[58] In the entire circumstances of this 2020 suit, this court finds and concludes that:

(i) the law firm MHI would not be embarrassed if they continue to represent the plaintiffs in this 2020 suit, and as such, there is no contravention of r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978;

(ii) viewed objectively, the law firm MHI have no reason to believe that their own professional conduct is likely to be impugned in this 2020 suit if they continue to act for the plaintiffs here, and therefore there is no contravention of r. 4 of the Legal Profession (Practice and Etiquette) Rules 1978;

(iii) the law firm MHI's continuation to act for the plaintiffs in this 2020 suit does not render, and would not, render it difficult for him to maintain his professional independence and also is not incompatible with the best interest of the administration of justice: sub-r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978;

(iv) insofar as it relates to Platinum Parking and Alunan Rancak, the law firm MHI would not contravene sub-r. 5(b)(i) of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings". In the earlier stages of the proceedings, law firm MHI did not act for Platinum Parking or Alunan Rancak. In derivative proceedings, it is common practice and generally accepted that the law firm who acted for the applicants to obtain leave to sue on behalf of a company will subsequently continue as the solicitor in the derivation action proper acting for the original applicants as well as for the company after the leave has been granted by the court; and

(v) the law firm MHI's continuation to act for the plaintiffs in this 2020 suit would not render it practically impossible or difficult to perform his professional duty under sub-r. 35(b) of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "An advocate and solicitor shall preserve his client's confidence and this duty outlasts his employment".

[59] In the plaintiffs' submissions in opposition to the defendant's counter-application in encl. 12, the plaintiffs have also questioned the motive behind the defendant's counter-application. In the entire circumstances of this case, this court has found and concluded that the defendant has failed to prove any disqualifying situation to adequately support the defendant's challenge against the law firm MHI's continuation to act for the plaintiffs in this 2020 suit. In view of the above, it is unnecessary for this court to make any finding or conclusion on the defendant's motive behind encl. 1 application.

Conclusion

[60] By reason of the aforesaid, this court has concluded and held that the plaintiffs' application in encl. 9 is allowed with costs and that the law firm ASSC shall forthwith cease to act for TTDI Harta in this 2020 suit.

[61] By reason of the aforesaid, this court has concluded and held that the defendant's application in encl. 12 is dismissed with costs and that the law firm MHI may continue to act for the plaintiffs Harta in this 2020 suit.